

After having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant was a delivery person for respondent when on July 12, 1995, while making deliveries to Vulcan Chemical Company, she was exposed to an unidentified chemical causing her to experience difficulty breathing. Claimant immediately left the Vulcan Chemical dock and went into an exterior door into a storage area. She notified Vulcan of the leak. Later, claimant returned to her truck and began unloading materials. Claimant was again exposed to the unidentified fumes and suffered the same response again, including shortness of breath, irritation in her throat, and coughing.

Claimant underwent conservative treatment with several doctors with the only treating physician to testify being Dr. Mark Wencel, a pulmonary physician, board certified in internal medicine, pulmonary disease, and critical care medicine. Dr. Wencel first saw claimant on December 21, 1995. She described an exposure to chemical fumes with complaints of chest tightness and shortness of breath. Dr. Wencel performed a multitude of pulmonary function tests and chest x-rays, which were all normal. The pulmonary function tests showed no evidence of a reactive airway disease. Claimant had been treating with multiple inhalers as well as systemic steroids, which may have had an effect upon her test results.

Dr. Wencel continued treating claimant for a period of several months and administered several pulmonary airway tests, including spirometry tests and methacholine challenge studies. These tests were read as normal, again indicating no evidence of a reactive airway disease.

Dr. Wencel was provided the October 1995 tests performed by Dr. Vincent M. Lem, a pulmonologist also board certified in internal medicine and critical care medicine. Dr. Lem's methacholine challenge test showed a positive reaction. Dr. Wencel, however, felt the test results had been altered due to an inadequate effort on claimant's part to take in air before blowing into the test machine. By March 1996, Dr. Wencel had concluded that claimant did not have a reactive airway disorder and any exposure suffered by claimant on July 12, 1995, had resulted in a temporary irritation only, which had resolved.

Dr. Wencel acknowledged that claimant continued to have symptoms, including chest tightness and exertional shortness of breath. Claimant also described wheezing but the doctor could not elicit wheezing during any of his examinations. He felt there was some incompatibility between the objective data from the tests and claimant's complaints and symptoms.

He ultimately confirmed that there was no objective evidence of obstructive airway disease although he acknowledged there could be some airway irritation. He was unable to explain claimant's ongoing symptomatology but felt it was in no way connected to the

July 12, 1995, incident. He acknowledged claimant was still having symptoms the last time he saw her.

As indicated earlier, claimant was examined by Dr. Vincent Lem at the request of claimant's attorney. He first saw claimant on October 9, 1995. In his history of claimant, it was noted that claimant had experienced no past breathing difficulties. However, claimant had experienced some breathing difficulties in 1991 when she was treated for pericarditis. While Dr. Lem's notes indicate that he was aware of the pericarditis, it does not indicate he was aware of the symptoms experienced by claimant, and the fact that she collapsed on the job at that time. Claimant admitted to having shortness of breath during that situation.

It was also indicated in Dr. Lem's history that claimant did not smoke. On a question regarding how long claimant had smoked, claimant had written "none." This is contradicted by claimant's own testimony where she acknowledged that she smoked cigarettes through 1992. Claimant also admitted to smoking marijuana on occasion again through 1992.

Dr. Lem felt claimant had experienced a chemical exposure by history on July 12, 1995, which resulted in an irritation of her airway. He did administer the methacholine challenge test on more than one occasion. He felt the first test on October 1995 indicated a positive reaction with an indication that claimant's lung capacity was 23 percent below normal. He felt claimant had suffered a 25 percent impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (Revised).

When questioned on cross-examination, he explained that the 25 percent indicated claimant is symptomatic 25 percent of the time or less, and not that she has a 25 percent reduction in her body function. He acknowledged the methacholine challenge test of May 1997 showed a significant improvement with only minimal drops in claimant's functional abilities. He acknowledged on cross-examination that there is no table in the AMA Guides upon which to base an impairment based totally on the methacholine challenge test.

Claimant was referred to Dr. P. Brent Koprivica, board-certified in emergency medicine and occupational medicine, by her attorney on November 23, 1996. At that time, claimant continued to have complaints of shortness of breath, chest wall pain, fatigue, difficulty in performing her work, and numbness in her mouth and feet. Dr. Koprivica opined Dr. Lem's October 1995 methacholine challenge test showed an abnormality but that Dr. Wencel's test of March 6, 1996, was within normal limits. He acknowledged claimant had a history of panic attacks but had not had that problem for several years. He felt that the methacholine challenge test performed in May 1997 was abnormal. Based upon his examination, he felt claimant had a 15 to 25 percent permanent partial whole body functional impairment.

Dr. Koprivica's history taken from the claimant indicated that she had suffered no shortness of breath prior to 1995. This is contradicted by claimant's description of the

problems associated with the pericarditis. He was aware of claimant's history of panic attacks.

He also acknowledged the AMA Guides, Second Edition (Revised), which he used as a partial basis for his rating, included nothing which would address claimant's situation specifically.

The medical history questionnaire provided to Dr. Koprivica from the claimant requested information regarding claimant's past use of any illicit or illegal drugs. The form indicated claimant had not used any illegal or illicit drugs. On cross-examination, claimant acknowledged having used both marijuana and cocaine in the past. She further acknowledged that she had been convicted in 1994 of possession of cocaine with intent to sell. Claimant testified that her marijuana and cocaine use ended in 1992 which is inconsistent with the 1994 conviction.

Claimant was examined at respondent's request by Dr. Gerald R. Kerby of the University of Kansas Medical Center. Dr. Kerby is a Professor of Medicine in the Division of Pulmonary and Critical Care and is board-certified. He first saw claimant on August 5, 1997. He performed an examination and studied the results of the multitude of tests performed upon claimant. He felt claimant's x-rays and pulmonary function studies were normal and assessed claimant no functional impairment.

He was provided Dr. Lem's October 1995 methacholine challenge test results. He also opined that claimant did not fully inhale during the test, which would render the test results invalid. Dr. Kerby found that claimant developed shortness of breath on activity which he thought was fairly common and could find no objective evidence of an obstructive airway disease. He stated it was unlikely that claimant's current problems were related to the July 1995 exposure. During his examination, claimant had no complaints of chest wall discomfort and she was not coughing, although she did discuss occasional tightness in the chest and some shortness of breath on moderate to heavy exertion. He felt these were resulted from her overweight condition and lack of muscle conditioning and believed many of claimant's symptoms could be corrected with weight loss and physical conditioning. Dr. Kerby assessed claimant a 0 percent impairment as a result of the July 1995 exposure.

Conclusions of Law

In workers compensation litigation, it is the claimant's burden of proof to establish her right to an award of compensation by proving the various conditions upon which her right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 1995 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony, along with the testimony of the claimant, and any other testimony that may be relevant to the question of disability. The

trier of facts is not bound by the medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Administrative Law Judge, in reviewing the medical opinions of the various doctors, found Dr. Wencel, the treating physician, provided the more credible medical opinion. The Appeals Board agrees. Not only does Dr. Wencel find claimant to have suffered no permanent injury as a result of the July 1995 exposure, but he also discredited the testing performed by Dr. Lem, due to a less than maximum effort by claimant. This concern regarding claimant's lack of effort on the methacholine challenge test was echoed by Dr. Kerby. Both Dr. Wencel and Dr. Kerby felt claimant had provided less than maximum effort having taken less than a full breath during the test.

Claimant's entitlement to an award in this instance revolves to a great degree upon her credibility. The only tests which have shown claimant to have a positive reaction indicating some type of injury, have been questioned by two pulmonary specialists who believed claimant provided less than maximum effort while the tests were being administered. In addition, claimant withheld information regarding her past breathing difficulties, history of smoking, and history of drug use; information which would be useful to the examining and treating physicians before they could properly assess claimant's ongoing condition and how it may or may not relate to her work-related injury.

The Appeals Board, in considering the medical opinions of the examining and treating physicians, finds that claimant suffered a temporary aggravation of her airways on July 12, 1995, with no permanent impairment resulting therefrom. The injury suffered by claimant has completely resolved. Therefore, the Appeals Board finds the Award of the Administrative Law Judge, which allowed claimant temporary total disability compensation and medical treatment only, is appropriate and should be affirmed.

Claimant also requested that she be awarded future medical treatment. Neither Dr. Wencel nor Dr. Kerby felt claimant was in need of any additional medical treatment as her temporary condition had resolved. The Administrative Law Judge refused to order future medical care citing the opinion of Dr. Wencel. The Appeals Board agrees and adopts same as its own finding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated November 25, 1997, should be, and is hereby, affirmed and the claimant, Glenda D. Richards (Kelley), is granted an Award against the respondent and its insurance carrier for 35.57 weeks temporary total disability compensation at the rate of \$326 per week, totalling \$11,595.82, and the medical treatment provided through the date of the Award of the Administrative Law Judge. Claimant is denied any permanent partial disability as a result of this injury.

As of July 3, 1998, there is due and owing claimant 35.57 weeks of temporary total disability compensation at the rate of \$326 per week, or \$11,595.82, which is ordered paid in one lump sum less any amounts previously paid.

The fees necessary to defray the expense of the administration of the Workers' Compensation Act are assessed against the respondent and its insurance carrier as follows:

Deposition Services	
Transcript of regular hearing	\$202.00
Richard Kupper & Associates	
Deposition of Vincent M. Lem, M.D.	\$Unknown
Deposition of P. Brent Koprivica, M.D.	\$576.20
Barber & Associates	
Deposition of Mark Wencel, M.D.	\$394.60
Metropolitan Court Reporters, Inc.	
Deposition of Gerald R. Kerby, M.D.	\$327.60

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
 Lawrence D. Greenbaum, Kansas City, KS
 John D. Clark, Administrative Law Judge
 Philip S. Harness, Director